

AUG 8 1983

No. 82-1616

ALEXANDER L STEVENS
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,

Petitioner

v.

WEBER AIRCRAFT CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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Washington, D.C. 20530
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PETITION FOR WRIT OF CERTIORARI FILED MARCH 31, 1983.
CERTIORARI AUTHORIZED JUNE 27, 1983.

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DOCKET ENTRIES

C.D. Cal. Civ. No. 79-2883 WPG

WEBER AIRCRAFT CORP., ET AL.

vs

USA

DATE	NR.	PROCEEDINGS
7/31/79	pg	1. Fld complt. Issd summs. Case maybe ref to Mag. Penne.
8/13/79	cm	2. Fld ORD (WPG + DWW) transfrng actn to the cal of Judge William P. Gray for all fur procedngs. Attys notfd.
8/31/79	rlb	3. Fld summs rtnd Not srvd.
11/30/79	rlb	4. Fld alias summs rtnd srvd 11/9/79.
1/18/80	rlb	5. Fld deft's ANSWER to COMPLAINT.
3/ 6/80	rlb	6. Fld Crt's ntc of prlm PTC for 4/21/80, 4pm.
4/21/80	rlb	7. MIN ORD: Informal PTC had in cham- bers.
4/24/80	rlb	8. Fld pltf's ntc of tkng depos of Robert W. Crittenden & for prod of docs on 6/17/80. 9. Fld plf's ntc of tkng depos of Major General Richard E. Merkling & for prod of do on 5/30/80.
5/ 2/80	rlb	10. Fld deft's ntc Of mot & mot, rtnble 5/19/80, 10am, for S/J; memo of P/As; affds LODGED deft's proposed finds of fact & cncl of law. LODGED deft's proposed jdgmt.

(1)

DATE	NR.	PROCEEDINGS
5/ 5/80	rlb	11. Fld prae for & issd depo subp as to Major General Richard E. Merkling.
5/16/80	rlb	12. Fld plfs' ex parte app & rqst to cont mot for S/J; memo of P/As; affds of Silberberg & Galardi.
5/19/80	rlb	13. Fld support by Real Party in Intrest of mot for S/J by deft agnst plfs re prod of privileged docs. 14. MIN ORD: Hrg re defts' Mot for S/J: Matter cntd to 7/7/80, 10am & fur tkng of depos is enjoined pending fur hrg.
5/27/80	rlb	15. Fld plfs' ntc of cancellation of depos of Robert W. Crittenden & Major General Richard E. Merkling.
6-24-80	cg	16. Fld pltfs appendix memo of P/A in oppos to govts motn for S/J 17. Fld pltfs memo of P/A in oppos to govts motn for S/J arg, stmt of genuine issues, findngs & conclu of law LODGED—pltfs prop findngs & conclu of law
6-26-80	kt	18. Fld pltf Mills Mfg Corp's stmt of genuine issues
7- 8-80	lf	19. Fld Stip & ORD cont govt mtn for S/J to 8-4-80, 10AM
7-28-80	sb	20. Fld deft's reply to pltf opp to govt motn for S/J
8/15/80	rlb	21. Fld deft's finds of fact & cncls of law. 22. Fld jdgmt & ORD thereon that plfs' perm inj is Denied; that the cmplt is dismiss w/prej; ea prty bear its own costs. (Ent 8/18/80 m/cpys ntfid prtys) JS-6

DATE	NR.	PROCEEDINGS
*8/ 4/80	rz	23. MIN ORD: Crt hrs oral arg. Deft's mot fr S/J GRANTED. Crt shall allow pltf 5 days to submit objs to proposd jgmt
9-19-80	1w24	Fld pltf's NOTC OF APPEAL to 9th Cir C/A frm JDGMT ent 8-18-80 \$70.00 fdng & docket fees pd.
		25. Fld pltf's Designation of Reporter's Transcripts

DOCKET ENTRIES

9th CIR.

No. 80-5744

WEBER AIRCRAFT CORP., ET AL.

v.

UNITED STATES

DATE	FILINGS-PROCEEDINGS
1980	
Sep 26	DOCKET NUMBER ASSIGNED. -db- JS34 prepared
Oct 1	DOCKETED CAUSE & ENTERED APPEARANCES OF COUNSEL. -db-
Oct 29	Filed CERTIFICATE OF RECORD (10/21). ss
Oct 29	Aplt (Weber) opening brief due 12/8/80. ss
Nov 18	Fld mtn & ord (Clk) gtng Aplt/Pet ext of time to fl opng/reply brf to Dec 8 1980
Nov 28	Fld mtn & ord (Clk) gtng Aplt/Pet ext of time to fl opng/reply brf to: Jan 5 1981
Dec 19	Fld mtn & ord (Clk) gtng Aplt/Pet ext of time to fl opng/reply brf to: Feb 27 1981
1981	
Feb 23	Fld mtn & ord (CLK) gtng Appellants an ext of time to file thier Opening brief to: 4-13-81. bbm
March 12	Filed, as of March 11, aplt's (MILLS MFG CORP) motin for leave to file oversized brief. (CIVATT) 3/9 -db-
March 27	Filed order (SCHROEDER) upon due considera- tion of Mills Mfg. Corp.'s motion for leave to file an over- sized brief, the motion is denied. -db-
Apr 16	FILED ORIG & 15 APLTS' OPENING BRIEFS & EXCERPT OF RECORD. 4/13 ec

DATE	FILINGS-PROCEEDINGS
1981	
May 7	Revd aplts' copy of Designation of Clerk's Record. ec
May 12	Fld mtn & ord (CLK) gntg appellee an ext of time to file the answering brief to: 6-17-81. bbm
June 19	Filed orig & 15 Appellee's briefs. 6/17 ec
Jul 6	Filed orig & 15 Aplts' Reply briefs 7/1 ec
JULY 13	FILED as of 10/29/80 CERT RECORD ON APPAL IN TWO VOLS, PLDGS, VOL I copy R/T VOL II orig ONE ENVELOPE OF EXHIBITS pv
Nov 5	ARGUED TO: CANBY, NORRIS, CJJ, SMITH, DJ. Submission is delayed until the Court decides whether add'l statements from the parties are necessary. ss
Nov 5	Filed order (IN LA) (CANBY, NORRIS & R.E. SMITH*) submission of the case will be delayed until the Court decides whether or not it needs further state- ments from the parties regarding the exemption regula- tion of the Freedom of Information Act. Parties will be notified of either the submission of the case or the need for additional statements. -db-
Nov 5	Filed order (CANBY, NORRIS & SMITH*) the Gov- ernment is invited to submit a brief memorandum on or before Nov. 18, 1981 directed to the following points; (see case file). Aplts may submit a brief written response to the Government's memorandum on or before Nov. 25, 1981. -db-
Nov 17	Filed aple's supplemental memorandum pursuant to court's order of Nov. 5, 1981. (panel) 11/16 -db-
Nov 27	Filed orig & 5 aplts' supple memorandum in response to aple's supplemental memorandum. (11/24) (panel) ogm
1982	
Sept 21	ORDERED OPINION FILED & JUDGMENT TO BE FILED & ENTERED. ogm

DATE	FILINGS-PROCEEDINGS
1982	
Sept 21	FILED OPINION—REVERSED & REMANDED (SMITH, Dissenting). ogm
Sept 21	FILED & ENTERED JUDGMENT. ogm
Oct 5	Filed Appellee's motion to extend time to file for reconsideration and/or rehearing and/or rehearing en banc to Oct. 12, 1982. (Panel) 10/4 ogm
Oct 7	Filed Appellee's motion for an additional 21 day extension of time within which to file a petition for rehearing or a suggestion for rehearing en banc. (Panel) 10/6 ogm
Oct 15	Filed order (CANBY, NORRIS & SMITH*) upon due consideration, apel's mtn for a 21-day ext of time within which to file a petition for rehearing or a suggestion for rehearing en banc is granted. -db-
Oct 26	Filed Orig & 33 Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc. (Panel, Active Judges) 10/25 ogm
Oct 26	Received 15 add'l appellee's briefs previously filed on 6/19/81. ogm
Dec 3	Filed Order (CANBY, NORRIS, CJJ & SMITH, DJ) The Petition for Rehearing is DENIED and the suggestion for rehearing en banc is REJECTED. ec
Dec 13	MANDATE ISSUED
Dec 16	Filed appellee's motion to recall mandate. 12/15 (panel) ec
Dec 27	Filed order (CANBY, NORRIS, CJJ & SMITH, D.J.) The government's motion to recall the mandate and withhold its reissue for thirty (30) days following the recall is granted. pn

DATE	FILINGS-PROCEEDINGS
1983	
Feb. 3	Filed appellee's mtn to withhold mandate. (TO PANEL) bbm 2-2-83
Feb 10	Filed Order (CANBY, NORRIS & SMITH) The government's motion to withhold issuance of the mandate for a period up to including February 25, 1983 is granted. -ho-
Mar 1	Filed as of Feb. 25, USA third motion to withhold issuance of the mandate. (Norris) 2/24 -rmc-
March 9	Filed order (CANBY, NORRIS, CJ, & SMITH, DJ) The government's third motion to withhold issuance of the mandate for a period up to and including April 4, 1983 is GRANTED. pn
Mar 12	MANDATE ISSUED
April 14	Received, as of 4/8/83, SC notice of filing of petition for cert on 3/31/83, SC#82-1616. pn
July 1	FILED CERTIFIED COPY OF SC order of 6/27/83, granting cert. (COPIES TO PANEL) pn

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Attorneys for Plaintiff
WEBER AIRCRAFT CORPORATION

LAWRENCE J. GALARDI
1901 Avenue of the Stars, Suite 1631
Los Angeles, California 90067
Attorney for Plaintiff

MILLS MANUFACTURING CORPORATION

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 79 02883 WPG (PX)

WEBER AIRCRAFT CORPORATION, an unincorporated
division of WEBER KIDDE AND COMPANY, INC.;
MILLS MANUFACTURING CORPORATION, PLAINTIFFS

-v8-

UNITED STATES OF AMERICA, DEFENDANTS

[Filed Jul. 31, 1979]

COMPLAINT PURSUANT TO 5 U.S.C. 552,
AND THE FREEDOM OF INFORMATION ACT

Plaintiffs, by and through their attorneys, KIRTLAND
& PACKARD and LAWRENCE J. GALARDI, ESQ., as
and for their complaint herein, allege:

I

WEBER AIRCRAFT CORPORATION is an unincor-
porated association whose principal place of business is
the State of California. MILLS MANUFACTURING
CORPORATION is a New York corporation whose prin-
cipal place of business is the State of North Carolina.

The records, reports, documents and material sought herein are located within the jurisdiction of this Court and are under and subject to the control of defendant in this jurisdiction. This action is brought pursuant to 5 U.S.C. 552, and the Freedom of Information Act.

II

Plaintiffs in this action, WEBER AIRCRAFT CORPORATION and MILLS MANUFACTURING CORPORATION, are also presently defendants in a suit for damages brought by Richard Hoover, Captain, United States Air Force, Retired, as a result of injuries which he sustained during an ejection from an Air Force F-106 B aircraft on October 9, 1973, using a parachute allegedly designed by WEBER AIRCRAFT CORPORATION, and utilizing a canopy allegedly manufactured by MILLS MANUFACTURING CORPORATION.

III

Captain Hoover, in his action against WEBER AIRCRAFT CORPORATION and MILLS MANUFACTURING CORPORATION, contends that his accident was caused by, *inter alia*, WEBER AIRCRAFT CORPORATION's failure to properly design said parachute, and MILLS MANUFACTURING COMPANY's failure to properly manufacture said canopy.

IV

Plaintiffs are informed and believe and therefore allege that they have a valid defense to this action against them by Captain Hoover, but are unable to determine the cause of said accident in order to properly present such defense.

V

As a result of said accident, the United States Air Force conducted an investigation of said accident and the cause thereof. Plaintiffs are informed and believe

that said investigation included testimony of witnesses and the opinions, conclusions, findings and recommendations of the investigation board. Said information is and has been compiled into a document known as the Air Force Accident Investigation Report and consists of a report of information, facts and documentary evidence. The report is now in the possession and custody of the Deputy Inspector General for Inspection and Safety, United States Air Force, Norton Air Force Base, County of San Bernardino, State of California.

VI

Plaintiffs herein, through their counsel, requested a complete copy of said report by letters dated September 1, 1977 and September 6, 1977, which copy was to be provided at plaintiffs' expense. Plaintiffs' letters are attached hereto and designated as Exhibits "A" and "B", respectively. Major General, Richard E. Merkling, Commander, Air Force Inspection and Safety Center, Norton Air Force Base, denied plaintiffs' request for a copy of said report in part by letter dated September 30, 1977 and a letter to Kirtland & Packard date illegible, attached hereto and designated Exhibits "C" and "D", respectively. Major General Merkling excised the investigating board's opinions, conclusions, findings and recommendations, statements of witnesses and certain medical data concerning Captain Hoover from said report.

VII

This decision to withhold release of portions of said report was appealed to the Secretary of the Air Force by plaintiffs' counsel by letter dated November 25, 1977, attached hereto and designated Exhibit "E". The Deputy Administrative Assistant to the Secretary of the Air Force, Eldon L. McColl, affirmed the denial of release of said portions of said report with one minor exception in his letter dated February 1, 1977, attached hereto and designated Exhibit "F".

VIII

Plaintiffs have exhausted all administrative remedies available and are authorized to file this Complaint by the Freedom of Information Act, 5 U.S.C. 552.

IX

The report requested and sought is available under the Freedom of Information Act, 5 U.S.C. 552, the denial by the United States Air Force of access to the entirety of said report being a violation of the provisions of said Act. Pursuant to the provisions of said Act, this Court should enjoin the United States Air Force and the Deputy Inspector General for Inspection and Safety, Norton Air Force Base, from withholding any portion of said report and its exhibits for examination and copying by plaintiffs herein, at plaintiffs' expense, and plaintiffs herein seek an order compelling the production, inspection and copying of the entirety of said report and its various attachments and related documents and materials.

X

Plaintiffs further seek and request priority on this Court's calendar pursuant to 5 U.S.C. 552(3).

WHEREFORE plaintiffs pray:

1. For an order enjoining the United States Air Force and the Deputy Inspector General and Inspection and Safety, Norton Air Force Base, from withholding any portion of the Air Force Accident Investigation Report, compiled in connection with the accident identified in plaintiffs' complaint and for an order requiring and directing the production of the entirety of said report and all exhibits thereto for examination and copying at plaintiffs' expense.
2. For assignment of a date for hearing at the earliest practicable date.
3. For costs of suit, and;

4. For such other and further relief as to this Court seems just and proper.

DATED: June 29, 1979.

JACQUES E. SOIRET
KIRTLAND & PACKARD

By /s/ Jacques E. Soiret
JACQUES E. SOIRET
Attorneys for Plaintiff
Weber Aircraft Corporation

DATED: June 29, 1979.

LAWRENCE J. GALARDI, ESQ.

By /s/ Lawrence J. Galardi
LAWRENCE J. GALARDI
Attorney for Plaintiff
Mills Manufacturing
Corporation

EXHIBIT "A"

Law Offices

LAWRENCE J. GALARDI
A Professional Corporation
Suite 163
1901 Avenue of the Stars
Century City
Los Angeles, California 90067
(213) 553-1300

September 1, 1977

Air Force Inspection
and Safety Center
Norton Air Force Base
California 92409

Re: Control No. F106/73-10-9-1; S/N FM 57-2527;
Life Sciences Portion of Air Force Accident In-
vestigation Report, Air Form Form 711-GA
Made in Connection with Crash of F106B Air-
craft on October 9, 1973; Tyndall Air Force
Base, Florida

Dear Sirs:

You are hereby requested to furnish a copy of the Life Sciences portion of the Air Force Accident Investigation Report referenced above made in connection with the investigation of the subject crash. This request is made in accordance with 5 USC 552, et. seq.

Please be advised that Captain Richard Hoover, the pilot of said aircraft, has filed suit in the United States District Court for the Central District of California seeking damages for injuries sustained in said crash. The filing of said suit constitutes a waiver in accordance with the provisions of 5 USC 552(a), and the herein-

above described portions of the Life Sciences Report, are therefore requested.

If you will forward a copy to this office together with a statement of charges for furnishing said copy, remittance will promptly follow. You are further requested to insure the legibility of all portions of the copy furnished.

Thank you very much for your courteous and prompt attention.

Sincerely yours,

/s/ Lawrence J. Galardi
LAWRENCE J. GALARDI

LJG:fd

bcc: Marshall Silberberg, Esq.

EXHIBIT "B"

September 6, 1977

Control No. F106/7310-9-1

Air Force Inspection and Safety
Center
Norton Air Force Base, CA 92409

Re: Hoover vs. Weber

Gentlemen:

The undersigned currently represents Weber Aircraft Corporation in litigation brought by Richard Hoover, Captain, United States Air Force, Retired, as a result of injuries which he sustained during an ejection accident which occurred on October 9, 1973.

It has come to our attention that the Air Force maintains statistics and studies in relation to injuries incurred during parachute ejection accidents, under Control Number F106/7310-9-1. I would respectfully request that you forward to the undersigned all studies and statistics relating to injuries during parachute ejections during the period 1970 up to and including the present, along with all photographs which may be part of said reports. Any and all costs will be paid by the undersigned.

Should there be any problems with this request please contact the undersigned at your earliest convenience.

Thank you for your courtesy and cooperation.

I remain,

Very truly yours,

KIRTLAND & PACKARD

MARSHALL SILBERBERG

MS:nf

EXHIBIT "C"

DEPARTMENT OF THE AIR FORCE
Headquarters Air Force Inspection and Safety Center
Norton Air Force Base, California 92409

[SEAL]

REPLY TO

ATTN OF: SERR

30 SEP 1977

SUBJECT: Request for Life Sciences Data from F-106B
Aircraft Accident Report, 9 October 1973

TO: Mr. Lawrence J. Galardi
Suite 1631
1901 Avenue of the Stars
Century City
Los Angeles, California 90067

1. This is in response to your letter of 1 September 1977, requesting Captain Hoover's life sciences data contained in the subject report.
2. Attached is a copy of the factual portions of that section of the report. Much of the information contained in the life sciences form (AF Form 711gA) is exempt from disclosure under the Freedom of Information Act, Public Law 90-23.
 - a. Some of the information is based on the opinions, conclusions, findings and recommendations of the investigation board. Those portions are withheld under 5 U.S.C. 552(b) (5). The release of such information would have a stifling effect on the free and frank expression of ideas, opinions and recommendations between Air Force officials.

b. Other sections of the form contain information which is obtainable only from the testimony of unsworn witnesses. Each witness was promised that his statements would be used solely for accident prevention and that they would not be released for any other purpose. The promise of confidentiality is made to induce the witness to tell the board everything he knows about the accident even though his statement may be against his personal interest. Such testimony and the direct or implied references to it are withheld under 5 U.S.C. 552(b) (4) and (5).

c. The social security numbers have been deleted under 5 U.S.C. 552(b) (6). Disclosure of this information would result in a clearly unwarranted invasion of personal privacy.

3. The decision to withhold release of portions of this mishap report may be appealed in writing to the Secretary of the Air Force within 45 days from the date of this letter. Include in your appeal any reason for reconsideration you wish to present and attach a copy of this letter. Address your letter as follows: Secretary of the Air Force, through HQ AFISC, Norton Air Force Base, California 92409.

4. Federal regulations require that search and reproduction costs for the attached material be assessed to the requesting party. The total fee is \$4.90. Please make your check payable to ADSN 5036, AFO Norton AFB, CA, and forward it to HQ AFISC/DA, Norton Air Force Base, California 92409.

5. If we may be of further service, please advise.

/s/ Richard E. Merkling
RICHARD E. MERKLING
Major General, USAF
Commander

1 Atch
Accident Report

ITEM		PERSONAL, SURVIVAL, AND ESCAPE EQUIPMENT	
DESCRIPTION AND MODEL DESIGNATION		PER. QUANTITY	AVAIL. ABL.
Gloves flying summer FRP-1		X	X
Underwear, civilian		X	X
Coveralls CWU-27/P		X	X
Helmet-custon fit (Wright-Patterson)		X	X
Boots combat		X	X
Gloves flying summer FRP-1		X	X
Visor, single tinted		X	X
Underwear, civilian		X	X
BURDEN VEST ABTU-5/P		X	X
BURDEN RELEASER F-2400		X	X
LIFE VEST LRU-31P		X	X
LIFE DRAFT LRU-31P		X	X
SURVIVAL KIT RT-10		X	X
SIGNALLING DEVICES			
Beacon personnel locator IURT-27		X	X
Flare signal MK-17		X	X
Signal kit A/D 255.1		X	X
Whistle police		X	X
Minor signaling		X	X
Dive sea marker		X	X
Search light SML-5/F		X	X
SURVIVAL KIT (Container) 140000-24A		X	X
STATE SURVIVAL KIT Survival SRKII-21P		X	X
Bag sleeping		X	X
Kit raft repair		X	X
Manual survival AFM 164.5		X	X
Matches		X	X
Kit first aid Part I & II		X	X
Repellent insect		X	X
Knife survival pocket		X	X
Bag water 9 qt		X	X
Balloons General purpose		X	X
Caniment sun		X	X
Foil aluminum		X	X
Kit desaliner		X	X
Tourniquet		X	X
Kit minimum survival SRKII-16/P		X	X
RESCUE KIT (Two belts, shoulder harness, leg restraints)			
LADY BELT, MBU-48/A		X	X
Thigher harness, restraint		X	X
PROTECTIVE-THICK GORE DEPLOYED P/N 13-4-10 G-1 canopy		X	X
PARACHUTE CANOPY RELEASE J-1		X	X
PARACHUTE OPENING/DEPLOYMENT DEVICES			
drogue gun P/N		X	X
SEAT KIT Weber - Rocket		X	X

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EXHIBIT "D"

DEPARTMENT OF THE AIR FORCE
Headquarters Air Force Inspection and Safety Center
Norton Air Force Base, California 92409

REPLY TO
ATTN OF: SERR

[SEAL]

Request for Information from F-106B Accident Report, 9 October 1973 and Studies Involving Parachute Ejection Injuries

Kirtland & Packard
ATTN: Mr. Marshall Silberberg
626 Wilshire Boulevard
Los Angeles, California 90017

1. This is in response to your letter of 6 September 1977 and telephone conversations with Mr. Hellman and Captain Bowley (Reports Branch) on 12 and 26 September 1977, requesting information regarding parachute ejection injuries and a copy of the subject accident report.
2. Attached is a copy of the factual portions of the safety investigation report. Those portions exempt from the Freedom of Information Act, Public Law 90-23, are:
 - a. The investigating board's opinions, conclusions, findings and recommendations are not releasable. This information is exempt from disclosure under 5 U.S.C. 552(b)(5). It may be withheld under the statute and regulations because the release of such information would have a stifling effect on the free and frank expressions of ideas, opinions, and recommendations between Air Force officials.

b. The statements of witnesses giving unsworn testimony before the investigating board are not releasable, nor are direct or implied references to such testimony or statements. Each witness was promised by testifying that his testimony would be used solely for accident prevention and would not be used for any other purpose. This promise of confidentiality is to induce the witness to tell the board everything he knows about the accident even though his statement may be against his personal interest or possibly incriminating. Such testimony is exempt under 5 U.S.C. 552(b)(4) and (5). Statements are retained in confidence as they are essential to an effective investigation.

c. The medical data are exempt from release under 5 U.S.C. 552(b)(6), as are the social security numbers of individuals referred to in the report. Disclosure of this information would result in a clearly unwarranted invasion of personal privacy. However, Capt. Hoover has authorized the release of his medical data to litigants in this action: the factual portions are in Tab H of the report. Those portions which have been excised are exempt under the provisions of the code quoted above.

3. The decision to withhold release of portions of this mishap report may be appealed in writing to the Secretary of the Air Force 45 days from the date of this letter. Include in your appeal any reason for reconsideration you wish to present and attach a copy of this letter. Address your letter as follows: Secretary of the Air Force, through HQ AFISC, Norton Air Force Base, California 92409.

4. As requested, available studies and statistical data are also attached. Attachment 4 con-

tains narrative description of several mishaps. References to the specific mishap have been deleted. This was done because information in the narratives is based upon findings and conclusions of the board or is derived from witness statements or testimony. Additional factual data from the specific reports is included if it was available.

5. Federal regulations require that search and reproduction costs for the attached material be assessed to the requesting party. The total fee is \$55.55. If glossy prints are required, add \$1.25 for each print to the above amount and they will be forwarded as soon as possible. Please make your check payable to ADSN 5036, AFO Norton AFB, CA, and forward it to HQ AFISC/DA, Norton Air Force Base, California 92409.
6. In addition to the safety investigation, a collateral investigation was conducted by the Staff Judge Advocate regarding the subject accident. The report of that investigation is not maintained at this headquarters. For information contained in the collateral investigation report, contact the Staff Judge Advocate, Headquarters Aerospace Defense Command, Peterson Air Force Base, Colorado 80914.

7. If we may be of further service, please advise.

[Illegible]

- 5 Atch
- 1. Safety Report
- 2. F-106 Aircraft Ejections
- 3. Life Support Experience
- 4. Life Sciences Narratives
- 5. USAF Escape System Experience

EXHIBIT "E"

November 25, 1977

Richard E. Merkling
Major General, United States
Air Force Commander
DEPARTMENT OF THE AIR FORCE
Headquarters Air Force
Inspection and Safety Center
Norton Air Force Base, California 92409

RE: Request for statistics and studies of injuries incurred during parachute ejection accidents relevant to Captain Hoover's accident of October 9, 1973

Dear General Merkling:

Thank you for the information you sent in regard to our request for information as of September 6, 1977. The information that was sent is generally helpful.

However, we are appealing the fact that some relevant information was not sent. We feel that there was some material that was deleted that is vitally needed which we are entitled to receive. As you may recall, my written request for "all studies and statistics relating to injuries during parachute ejections during the period 1970 up to and including the present, along with all photographs which may be part of said reports."

The checklist and index to the U.S.A.F. Accident/Incident Report indicates that there is some information that is considered not applicable. This information includes: AF Forms 711a, d, e, f, 781 series, and rebuttals. We would like to know why this information is considered not applicable. We would appreciate your identifying each item by topic and subject matter, and an explanation as to why it is not applicable. Your ex-

planation as to the specific content of this material will help us decide whether it would continue to be in the interest of our client to proceed with our appeal as to each of the items that have been specified.

We are also appealing the deletion in Attachment Four of the F-106B mishap on 9 October 1973. As you are aware, this is the information which is most relevant to the lawsuit at hand which involves the pilot and our client.

One reason for appealing the deletion in Attachment Four is that it is necessary in order to show that it contradicts Captain Hoover's deposition testimony. There is case authority to permit such information for this purpose. See *Pilar v. S. S. Hess Patrol* (D. Md. 1972) 55 Federal Rules Decisions 159.

Another reason for appealing the deletion in Attachment Four is that our client should have the benefit of the information available when it was fresh and which only statements made close to the accident date can provide. See *McFadden v. Avco Corp.* 278 F.Supp. 57 (MDA LA. 1967).

A further reason as to why this information should be provided is that any privilege that may exist has already been waived. Air Force officials have already provided our client with Air Force investigation material concerning the landing of Captain Hoover. The Air Force's voluntary disclosure of any such information waives any such claim of privilege to the same information in the future. See *O'Keefe v. Boeing*, (SDNY 1965), 38 F.R.D. 329.

We also are appealing the failure to provide us with any information that we are unaware of which you may have that would be relevant to our request for information on September 6, 1977.

Thank you for your anticipated attention and assistance in this matter.

Very truly yours,

KIRTLAND & PACKARD

By _____
MARSHALL SILVERBERG

DL/MS:rp

Enclosure

cc: Secretary of the Air Force

EXHIBIT "F"

DEPARTMENT OF THE AIR FORCE
Washington 20330

OFFICE OF THE SECRETARY
Mr. Marshall Silberberg
Kirtland & Packard
Sixth Floor
626 Wilshire Blvd
Los Angeles, CA 90017

[SEAL]

Dear Mr. Silberberg:

This is in response to your letter of 25 November 1977. Although not addressed to the Secretary of the Air Force, it has been processed as an appeal, under the Freedom of Information Act, from the action of Major General Richard E. Merkling, Commander, Air Force Inspection and Safety Center (AFISC), dated 11 October 1977. General Merkling addressed your previous request for information on parachute mishaps, particularly the one of 9 October 1973, involving an ejection from an F-106B aircraft, in which Captain Richard D. Hoover was injured.

The Office of the Secretary of the Air Force has considered your appeal, and I have determined that it should be granted in part and denied in part.

To the extent that you have appealed the denial of portions of the accident report, I have determined that General Merkling's previous action was proper, with the following exceptions. Portions of five (5) pages of the Life Sciences Report contain unprivileged, factual material which may be released. These pages are attached. The balance of the mishap report must be denied for the reasons previously stated.

You have made special note of the partial denial of the Life Sciences Report in the above described mishap. You may, if you have not already done so, wish to obtain blank copies of all the pages of AF Form 711gA which

make up the Life Sciences Report. This will assist you in putting our disposition of this form in context. The form consists, in the main, of blanks which the Life Sciences member(s) of the mishap investigation board completes with appropriate letters or numbers. Much of this material has been released to you. Those portions denied are the subjective non-factual evaluations of the Life Sciences officer, or the nonsegregable factual material which came directly from witness statements. Seven pages of narrative (pp 11-11.6), consisting of the same type of information (deliberative, predecisional material, or summaries directly from witness statements) have been withheld for the same reason.

Life Sciences officers, like all aircraft mishap safety board members, are aware that aircraft mishap safety reports are conducted solely for flight safety purposes and used only within the Air Force to preclude future mishaps. Because of this practice, investigators feel more disposed to assess blame, and to speculate as to causes of mishaps and resulting damages and injuries. The disclosure of such opinions and deliberations outside the Air Force would inhibit future investigators from furnishing their complete and candid appraisals.

Similarly, witnesses are assured that their statements and testimony concerning a mishap will be used solely for accident prevention and not disclosed outside the Air Force. Thus, witnesses are encouraged to come forward, and to disclose all information they have, even if it is against their personal interest or the interests of their close associates. The disclosure of these witness statements, or information directly derived from them, would break faith with the witnesses and effectively dry up this source of information in the future.

For the above reasons, investigators' deliberations are exempted from mandatory public disclosure under 5 U.S.C. 552(b) (5), and witness statements are exempted under 5 U.S.C. 552(b) (4) and (b) (5). *Brockway v Dept of the Air Force*, 518 F.2d 1184 (8th Cir. 1975); *Rabbitt v Dept of the Air Force*, 401 F. Supp. 1286

(S.D. N.Y. 1974); *Theriault v United States*, 395 F. Supp. 637 (C.D. Ca. 1975); *Cooper v Dept of the Navy*, 396 F. Supp. 1040 (M.D. La. 1975) aff'd, 558 F.2d 274 (5th Cir. 1977). We have considered the *McFadden v Avco* case and *Pilar v S.S. Hess Patrol* case, cited in your letter. However, in view of our substantial need to protect the withheld portions of the report, we rely upon the more recent case law cited above. We do not agree that, in making a partial disclosure of the report, in compliance with the Freedom of Information Act, we have waived our right to withhold the nonreleasable portions.

You have inquired why certain tabs in the report were labeled "not applicable". This is because the index, AF Form 711h, is a general form used for all types of mishap reports. The tabs listed as not applicable in this case were simply not a part of this report. They were not withheld from you.

In addition to the releasable portions of the mishap safety report, AFISC sent you other information on parachute mishaps. Should you require further information or have questions about this information, you may, of course, consult with AFISC. You should attempt to be more specific than "all statistics and studies," as this term is too broad to permit a meaningful search.

To the extent that documents responsive to your appeal have been denied, you are advised that this is the final action by the Air Force on your appeal. The Freedom of Information Act, 5 U.S.C. 552, provides for judicial review of this determination.

Sincerely,

/s/ Eldon L. McColl
ELDON L. MCCOLL
Deputy Administrative Assistant

1 Attachment
Releasable Portions of
AF Form 711gA

ANDREA SHERIDAN ORDIN
United States States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division
JAMES STOTTER II
Assistant United States Attorney
1100 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 688-2449
Attorneys for Defendant

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 79-02883-WPG (Px)

WEBER AIRCRAFT CORPORATION, an unincorporated
division of WEBER KIDDE AND COMPANY, INC.;
MILLS MANUFACTURING CORPORATION, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

ANSWER TO "COMPLAINT PURSUANT TO
5 U.S.C. 552 AND THE FREEDOM OF
INFORMATION ACT"

For their answer, defendant admits, denies, and alleges as follows:

FIRST DEFENSE

The Court lacks jurisdiction over the subject matter of the action in that these documents plaintiffs seek fall

within the exemptions to 5 U.S.C. § 552, set forth as 5 U.S.C. § 552(b).

SECOND DEFENSE

In answer to the numbered paragraphs of plaintiffs' Complaint, defendant admits, denies, and alleges as follows:

I. In answer to the first and second sentences, defendant is without knowledge of information sufficient to determine the truth or falsity of said allegations, and on that ground denies said allegations. In answer to the third sentence of said paragraph defendant admits that the Aircraft Mishap Safety Report is maintained by the United States Air Force Inspection and Safety Center at Norton Air Force Base, California. Except as admitted, each and every allegation in said third sentence is denied. In answer to the fourth sentence of said paragraph, it is denied as a conclusion of law.

II, III, and IV. Defendant is without sufficient knowledge and information upon which to form a belief as to the truth or falsity of said allegation and basing its denial on that ground denies each and every allegation therein contained.

V. Admitted except that it is alleged that the United States Air Force has two types of aircraft investigations applicable to the subject accident; the Aircraft Accident Investigation conducted pursuant to Air Force Regulation No. 110-14, dated July 18, 1977, and the Aircraft Accident Safety Investigation conducted pursuant to Air Force Regulation No. 127-4, dated October 24, 1975. The Safety Investigation conducted pursuant to Air Force Regulation No. 127-4 is maintained at the United States Air Force Inspection and Safety Center at Norton Air Force Base, California.

VI. Admitted.

VII. Admitted.

VIII. Admitted.

IX. Denied.

X. Denied as a question of law.

WHEREFORE, Defendant having fully answered, respectfully prays that this action be dismissed with prejudice, that the defendant be awarded its costs incurred herein, and for such other and further relief as the Court may deem just and proper.

DATED: This 18th day of January, 1980.

ANDREA SHERIDAN ORDIN
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division

/s/ James Stotter II
JAMES STOTTER II
Assistant United States Attorney
Attorneys for Defendant

MOTION FOR SUMMARY JUDGMENT

The defendant, United States of America, by and through its undersigned attorneys, moves this Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the ground that the documents sought by plaintiffs are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552 (b) (5). The United States is therefore entitled to summary judgment as a matter of law.

This motion is based on the pleadings on file with the Court, the Memorandum of Points and Authorities in Support of said Motion and the Affidavits of Major General Walter Reed, the Judge Advocate General, United States Air Force and Major General Len C. Russell, Commander, Air Force Inspection and Safety Center, United States Air Force, as well as any other matters and documents which may be brought to the attention of the Court at the time of the hearing of said motion.

DATED: This 2nd day of May, 1980.

ANDREA SHERIDAN ORDIN
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division

/s/ James Stotter II
JAMES STOTTER II
Assistant United States Attorney
Attorney for Defendant

INDEX OF DOCUMENTS CONTAINED IN THE
USAF ACCIDENT REPORT

- TAB A—AF Form 711, USAF Accident/Incident Report
by Colonel Joseph W. Rogers, dated 8 November 1973
- TAB C—AF FORM 711b, Air Force Accident/Incident Report
- TAB D—AF Form 711c, Aircraft Maintenance/Material Report
- TAB H—Two AF Form 711gA, Life Science Report of an Individual Involved in an AF Accident/Incident
- TAB J—Individual Flight Records
- TAB K—Flight Plan Forms
- TAB L—DD Form 365, Weight and Balance Clearance Form F
- TAB M—Certificate of Damage and Cost
- TAB N—Transcript of Recorded Communications
- TAB O—Any Additional Substantiating Data Reports
- TAB P—Statement of Damage to Private Property
- TAB Q—Other AF Forms
- TAB R—Diagrams (fallout-impact area, etc.)
- TAB S—Unsatisfactory Materiel Reports
- TAB T—Teardown Deficiency Reports
- TAB U—List of Technical Orders not Complied With
- TAB V—Statements of Witnesses
- TAB X—Orders Appointing Investigating Board
- TAB Y—Board Proceedings
- TAB Z—Photographs

INDEX OF WITHHELD DOCUMENTS CONTAINED
IN THE USAF ACCIEDNT REPORT

TAB A—AF Form 711, the Attachments entitled Investigation, Analysis, Findings, and Recommendations

TAB H—Pages 2, 7, 8, 10, 11.1, and 11.4-11.6 and portions of pages 4, 5, 6, 9, 11, 11.2, and 11.3 which are the opinions, recommendations and discussions of the Life Science member concerning Captain Richard D. Hoover. The Life Sciences Report on Captain Wayne G. Brown is withheld in its entirety.

TAB V—Statements of Witnesses: Captain Richard D. Hoover (two statements)
Captain Wayne G. Brown
2nd Lt Byron J. Little
2nd Lt. John G. Harris
Major Thomas R. Gainer
TSgt Harvey R. Pickelsimer
Major Wilfred G. Hammett
Captain William R. Flannagan
Mr. Sam Coxwell

TAB Y—Board proceedings including statements by:
Captain Wayne G. Brown
MSgt Murray R. Dixon
ALC Sammie R. Dickson, Jr.
Major Thomas R. Gainer

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 79-02883 WPG (PX)

WEBER AIRCRAFT CORPORATION, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANTS

AFFIDAVIT OF THE COMMANDER
AIR FORCE INSPECTION AND SAFETY CENTER
UNITED STATES AIR FORCE

COUNTY OF SAN BERNARDINO)
) ss
STATE OF CALIFORNIA)

Len C. Russell, Major General, Commander, Air Force Inspection and Safety Center, United States Air Force, being first duly sworn, says:

1. As the Commander, Air Force Inspection and Safety Center, United States Air Force, I am responsible for planning, directing, and evaluating Air Force Inspection and Safety Programs. The singularly most important facet of the Air Force safety program is the aircraft mishap investigations which are conducted pursuant to Air Force Regulation 127-4 and which are conducted for the purposes of enhancing flying safety and preventing future aircraft mishaps within the United States Air Force. United States Air Force Aircraft Mishap Investigations and Reports are prepared for use only within the United States Air Force for the sole purpose of accident prevention.

2. After careful consideration of the various effects of releasing United States Air Force Aircraft Mishap Reports, the Air Force determined not to permit the use of these reports for any purpose other than flight safety. This is true even within the Air Force. This policy has been in effect for over twenty-five years.
3. I am aware of the pending litigation, as described in the caption of this affidavit, which arose as a result of the crash of the F-106B aircraft on 9 October 1973. I am also aware that the United States District Court for the Central District of California is considering the plaintiff's complaint to compel production of certain documents relating to this mishap, and I am aware that these documents are contained in the Aircraft Mishap Report. Those records are all clearly marked "For Official Use Only. (This is a privileged document not releasable in whole or part to persons or agencies outside the Air Force without the express approval of the Secretary of the Air Force.)" These records contain conclusions, speculations, findings and recommendations made by the Aircraft Mishap Investigators, as well as by other Air Force personnel involved in the aircraft mishap investigation, and the testimony provided by witnesses under a pledge of confidentiality.
4. For the reasons hereinafter set forth, the release of the withheld portions of the Aircraft Mishap Investigation for litigation purposes would be harmful to our national security. The strength of the United States Air Force, upon which our national security is greatly dependent, is seriously affected by the number of major aircraft accidents which occur. The successful flight safety program of the United States Air Force has contributed greatly to the continuously decreasing rate of such accidents. The effectiveness of this program depends to a large extent upon our ability to obtain full and candid information on the cause of each aircraft accident. Much of the information received from persons giving testi-

mony in the course of an aircraft mishap investigation is conjecture, speculation and opinion. Such full and frank disclosure is not only encouraged but is imperative to a successful flight safety program. Open and candid testimony is received because witnesses are promised that for the particular investigation their testimony will be used solely for the purpose of flight safety and will not be disclosed outside of the Air Force. Lacking authority to subpoena witnesses, accident investigators must rely on such assurances in order to obtain full and frank discussion concerning all the circumstances surrounding an accident. Witnesses are encouraged to express personal criticisms concerning the accident.

5. I firmly believe that a promise given by the United States Air Force in good faith should be no less honored than a promise given by any other agency of the United States of America.

6. If aircraft mishap investigators were unable to give such assurances, or if it were felt that such promises were hollow, testimony and input from witnesses and from manufacturers in many instances would be less than factual and a determination of the exact cause factors of accidents would be jeopardized. This would seriously hinder the accomplishment of prompt corrective action designed to preclude the occurrence of a similar accident. This privilege, properly accorded to the described portions of an United States Air Force Mishap Report of Investigation, including those portions reflecting the deliberations of the Investigating Board, is the very foundation of a successful Air Force flight safety program.

7. In a study of the instant question, it was determined that during 1950, the year in which an agency was first created within the Air Force for the specific purpose of decreasing the number and effect of aircraft mishaps, 665 Air Force aircraft were destroyed in aircraft mishaps. In 1979, the destroyed aircraft total was reduced to 83. In 1950, there were 781 aircraft mishap fatalities. In

1979, the total number of aircraft mishap fatalities was reduced to 77. Of course, no pecuniary value can be placed on the lives of pilots and crewmembers saved by this reduced accident rate, but the salutary effect of this on the national security is plainly evident.

8. This trend of reduced accident rates is not a statistical phenomenon which accompanies an increase in flying hours. To the contrary, during a previous rapid expansion of flying prior to and during World War II, accident rates increased tremendously. The Air Force has found that reduced accident rates are directly attributable to an aggressive flight safety program. Reports of United States Air Force Mishap Investigation Boards are a most significant and important part of the flight safety program.

9. My legal adviser has consulted with me concerning the complaint to compel disclosure of the documents withheld from the plaintiffs. To release the withheld portions of the report would be directly contrary to the security of this nation which is so much dependent on the continued safety of flight within the United States Air Force.

10. I declare under penalty of perjury that the foregoing is true and correct. Executed on 25 Feb. 80.

/s/ Len C. Russell
LEN C. RUSSELL
Major General, United States
Air Force
Commander, Air Force Inspection
and Safety Center

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 79-02883
WPG (PX)

WEBER AIRCRAFT CORPORATION, *et al.*, PLAINTIFFS

v

UNITED STATES OF AMERICA, DEFENDANTS

AFFIDAVIT OF THE JUDGE ADVOCATE GENERAL
UNITED STATES AIR FORCE

COUNTY OF ARLINGTON)
) ss
COMMONWEALTH OF)
VIRGINIA)

Major General Walter D. Reed, The Judge Advocate General, United States Air Force, having been duly sworn says:

The general purpose and scope of this affidavit is to explain the action in making available in part and withholding in part an USAF Accident/Incident Report which is in the files of the Department of the Air Force. Reference will be made in this affidavit to the following regulatory publications:

Air Force Regulation 110-5, dated 28 May 1976, entitled "Releasing Information for Litigation and Appearance of Witnesses Before Civilian Courts and Other Tribunals." It pertains to the release of official Air Force information for litigation purposes and is Attachment 1.

Air Force Regulation 127-4, dated 1 January 1973, entitled "Investigating and Reporting US Air Force Accidents and Incidents." This regulation sets forth the purpose and limitations on the use of mishap reports. Air Force Regulation 127-4 is Attachment 2.

Air Force Regulation 110-14, dated 18 July 1977, entitled "Investigations of Aircraft and Missile Accidents." This regulation provides for investigations of accidents to obtain and preserve available factual evidence for purposes other than aviation safety. Air Force Regulation 110-14 is Attachment 4.

Air Force Regulation 127-4, dated 16 January 1978, Attachment 3, is the current regulation. The quotations hereinafter referred to are from the regulation in effect at the time of the investigation, Air Force Regulation 127-4, Attachment 2. The regulatory publications of the Secretary of the Air Force listed above have the force and effect of law. The USAF Accident/Incident Report generated under AFR 127-4, which is the subject of the complaint, consists of an Air Force Form 711h, USAF Accident/Incident Report checklist and index with tabs. These tabs are more fully described in the Index of the USAF Accident/Incident Report which is Attachment 5. The parties in this litigation have been furnished with all documents contained in the USAF Accident/Incident Report other than those described in Attachment 6.

Aircraft and missile accident investigations are conducted in major accidents pursuant to AFR 110-14 to obtain and preserve all factual information for use in claims, litigation, disciplinary action, adverse administrative proceedings and all purposes other than accident prevention and aviation safety. The parties to this litigation have been provided with the entire Aircraft and Missile Accident Report of Investigation pertaining to the F-106B aircraft crash, which occurred on 9 October 1973.

In addition to conducting an investigation of an aircraft accident under Air Force Regulation 110-14, the Air Force prepares USAF Accident/Incident Reports, which are specifically referred to in Air Force Regulation 127-4 as privileged documents for use solely within the Air Force in the interest of accident prevention. They are, thus, intra-agency memoranda. The withheld documents described in Attachment 6 are marked "For Official Use Only. (This is a privileged document not releasable in whole or part to persons or agencies outside the Air Force without the express approval of the Secretary of the Air Force.)"

The Secretary of the Air Force, in publishing Air Force Regulation 127-4, promulgated the most stringent protection against disclosure of USAF Accident/Incident Reports. Indeed, release of aircraft mishap reports to the public or to litigants would violate the very purpose for which the information contained in such reports was compiled in that it would have a serious adverse effect on the flying safety program and the Air Force.

The investigation of aircraft mishaps, a major aspect of the Air Force flight safety program, has contributed greatly to the sustained decreasing rate of accidents involving Air Force aircraft and the attendant loss of life. The success of this program depends in great measure on the ability of the Investigating Flying Safety Officer and Board of Officers to obtain full information as to the cause of any aircraft accident. The investigating officers and boards have no subpoena powers to compel testimony and, therefore, promise witnesses that their testimony will be used solely for the purpose of flight safety and that it will not be released to persons outside the Air Force. In the mishap investigations of all USAF aircraft mishaps conducted under the provisions of Air Force Regulation 127-4, complete assurance is given to any witness testifying or otherwise producing evidence that such testimony or evidence cannot be used in any other legal or administrative proceeding. This assurance

is given to persons who testify to encourage them to talk freely and frankly about aircraft mishaps so that the Air Force may discover possible hazards and prevent future accidents. The Air Force must be able to keep its promise of privilege and, in the instant case, I suggest there is a strong public interest in protecting that promise.

Where the Air Force has obligated itself in good faith not to disclose documents or information it receives, it should be able to honor such obligations.

The deleterious effect of releasing the deliberations, speculations, opinions, etc., of the Board members, including the Life Sciences member, is clear. The Board members must be able to speculate freely, to analyze every conceivable cause of the aircraft mishap and to recommend corrective action. They must be able to do this without concern for possible lawsuits, disciplinary action, and exposure of their conclusions and opinions to public scrutiny. They must have only one objective in these investigations—aviation safety.

When one considers the variety of information in the files of the Department of the Air Force and the possibilities of harm from unrestricted disclosure, the usefulness, indeed, the necessity, of a centralized statement of policy as to the releasability of information is obvious. Hence, it was appropriate for the Secretary of the Air Force, pursuant to the authority given him by the Congress in 10 U.S.C. 8012, to prescribe regulations not inconsistent with the law for the custody, use, preservation, and release of records, papers and property pertaining to the Department of the Air Force. He did so by promulgating Air Force Regulations 110-5, 110-14, and 127-4. Those regulations set forth the policy of the Secretary of the Air Force as to those documents within the control of the Department of the Air Force which are to be made available to persons involved in litigation proceedings. My discretion in making the determination discussed below is restricted by the limits set forth by the Secretary

of the Air Force. The Secretary's written policy, contained in Air Force Regulation 127-4, is as follows:

These reports and their attachments will not be released to the Department of Justice, any United States Attorney, or any other person for litigation purposes in any legal proceeding, civil or criminal, except . . . Notwithstanding the restrictions on the use of these reports and their attachments and the prohibitions in this regulation against their release, factual material, included in the accident/incident reports, covering examination of wreckage, photographs, maps, transcripts of air traffic communications, weather reports, maintenance records, crew qualifications, and like nonpersonal evidence may be released as required by law or pursuant to court order or upon specific authorization of The Judge Advocate General after consultation with The Inspector General

With a view toward achieving substantial justice, Air Force Regulation 127-4 was intended to strike a balance between the competing interests. The policy of the Secretary of the Air Force, as expressed in Air Force Regulation 127-4, weighs these interests and attempts to reconcile the conflicts: On the one hand, absolute non-disclosure of the contents of the USAF Accident/Incident Report in the interests of furthering the Air Force flight safety program by encouraging full and frank disclosure of all accident information; and, on the other hand, disclosure of factual data to litigants in civil actions when required by law or court order, upon specific authorization from The Judge Advocate General.

A distinction has been made between fact and opinion, conjecture and speculation. This has resulted in supplying the parties with the Aircraft or Missile Accident Investigation Report conducted under Air Force Regulation 110-14, and other factual information relating to the aircraft accident from which this litigation arose. The

only documents withheld, which are a small percentage of the total, are those described in Attachment 6.

I have been designated to make determinations of the releasability of official Air Force records and documents by order of the Secretary of the Air Force, as contained in Air Force Regulations hereinbefore mentioned. Pursuant to this authority, and in the course of my official duties, I have carefully examined the documents described in Attachment 6, and I have also consulted with The Inspector General, United States Air Force.

Having given careful consideration to the plaintiffs' complaint and to the impact of the production of the documents described in Attachment 6, I have determined that the production of the said documents or any portion thereof not already furnished the litigants would be prejudicial to the efficient operation of the Department of the Air Force and would not, therefore, be in the best interests of the nation.

I declare under penalty of perjury that the foregoing is true and correct. Executed on 4 Feb 1980.

/s/ Walter D. Reed
WALTER D. REED, MAJOR GENERAL
United States Air Force
The Judge Advocate General

DEPARTMENT OF THE AIR FORCE
Headquarters US Air Force
Washington DC 20330

AF REGULATION 110-5

28 May 1976

Judge Advocate General Activities

RELEASING INFORMATION FOR LITIGATION AND
APPEARANCE OF WITNESSES BEFORE CIVIL-
IAN COURTS AND OTHER TRIBUNALS

This regulation covers release of official Air Force information for litigation purposes, and guides Air Force military and civilian personnel appearing as witnesses. It does not apply to release of official information to courts-martial or administrative boards convened by United States Military authorities. Air Force personnel who have custody of official information requested for use in litigation, or who are requested to appear as witnesses, must comply. This regulation appears as 32 C.F.R. 840.

1. Terms Explained:

a. Official Information. All documents, records, or papers in the custody of the Air Force and its personnel, and factual matters within the knowledge of Air Force personnel, prepared or obtained in the performance of official duties.

b. Litigation. Lawsuits, hearings, investigations or similar proceedings in civilian courts, commissions, boards or other tribunals.

Supersedes AFR 110-5. 22 August 1969. (For summary of revised, deleted, or added material, see signature page.)

OPR: JAC.

DISTRIBUTION: F

2. Air Force Policy. Official factual information is made available for use in litigation, and Air Force personnel are permitted to testify concerning official factual information, unless the information is classified or privileged. Records exempted from public disclosure by 5 U.S.C. 552(b) are not required to be released, but Air Force policy is to release them if no significant purpose is served by withholding them (see AFR 12-30). Records in a system of records may not be disclosed if prohibited by 5 U.S.C. 552(a) (see AFR 12-35).

3. Who Is Responsible. The Staff Judge Advocate is responsible for the release of information for use in litigation if the United States is a party or the information requested would aid a claim or litigation against the United States. If he considers such action necessary, he may refer matters to The Judge Advocate General for decision. The Judge Advocate General may authorize the release of information or testimony of witnesses in civil litigation. Requests for official information for use in a foreign criminal court must be forwarded for action to The Judge Advocate General HQ USAF/JACI.

4. Limitations on Release of Information:

a. When the United States is a party to existing litigation, release information relevant to the litigation only when authorized by one of the following:

- (1) The Staff Judge Advocate.
- (2) The Judge Advocate General.
- (3) The United States Attorney General or an appropriate United States Attorney.

b. HQ USAF/JACI/JACC/JACP, as appropriate, will be immediately advised of all information which is released by a Staff Judge Advocate or upon authorization of The Attorney General or an appropriate United States Attorney.

c. Custodians who receive requests for information that might aid in a claim or litigation against the United

States should consult the staff judge advocate. He may approve release of the request, consult The Judge Advocate General about it, or forward it to an appropriate authority to deny the request, as specified by AFRs 12-30 and 12-35.

d. When the United States is not party to the litigation and the requested information does not appear to aid a claim or litigation against the United States, custodians may release information not classified or privileged as provided by AFRs 12-30 and 12-35.

e. Information of a personal nature from a system of records subject to the Privacy Act of 1974 may be released only under the conditions specified in AFR 12-35.

f. Classified defense information is not released to courts or unauthorized persons under any circumstances unless the classification is removed by proper authority. If classified information is subpoenaed and cannot be declassified at lower levels, notify The Judge Advocate General. Pending his decision, the person on whom the subpoena is served answers the subpoena and informs the court of the restrictions of this paragraph.

5. Fees and Charges. Persons releasing copies of records to non-Government requesters collect fees and charges under AFR 12-30 or 12-32, as appropriate.

6. Sending Requests. When requesting a decision or release of information from The Judge Advocate General, provide the information below, if it is readily obtainable:

- a. Name of litigation and parties
- b. Name and (illegible)
- c. Date the litigation began and date of requested appearance.
- d. Name and address of requester, and of party from whom the request was made.
- e. Type of action, subject matter, and a statement of the relevancy of the requested information.
- f. Copies of documents requested, or a complete description of them if they are bulky or numerous.

g. Recommendations on release, and any other pertinent information.

7. Requests for Depositions or Statements. Requests by parties to prospective or actual litigation not involving the United States, for statements or depositions of Air Force personnel concerning matters connected with their official duties may be granted, provided this regulation is followed. Staff judge advocates will give legal advice as needed. Statements and depositions are voluntary with the individual concerned, unless required by valid legal process or the order of competent military authority.

8. Authentication of Documents. Official Air Force documents used in civil litigation are authenticated by certificate, rather than by the personal appearance and testimony of the custodian, wherever practicable. The authentication procedure in AFR 110-10 meets the requirements of Federal courts and of most State courts and administrative bodies. Use the simplest authentication procedure permissible.

9. Release to the Department of Justice. Department of Justice, through the United States Attorneys, represents the Government's interest in all litigation involving the Air Force. Unclassified information that is not privileged should be released to the Department of Justice or the United States Attorney on request. Requests for classified information that cannot be declassified at lower levels, or for privileged information, are sent to The Judge Advocate General for decision.

10. Release to Government Contractors. Contracting Officers may grant requests from Government contractors for information for use in contractor litigation. Comply with this regulation and AFR 110-24.

11. Compliance With Subpoena:

a. Staff judge advocates give legal advice to Air Force personnel subpoenaed to appear and testify concerning official information. When release of the subpoenaed information is prohibited by this regulation, the person receiving the subpoena appears and explains the matter to the court. If the court is not satisfied and persists in requesting the information, the witness respectfully asks for time to send the question to The Judge Advocate General for decision. Judge advocates are authorized to accompany and advise the witness concerning a problem on release of official information.

b. When a subpoena is served which calls for information which is classified or otherwise determined to be not releasable, staff judge advocates are authorized to communicate with counsel who requested the subpoena, explain the restrictions on release, tender releasable information, and suggest withdrawal of the subpoena.

c. A subpoena which is defective for improper issue or service, or for lack of jurisdiction, is treated as a routine request for release of information.

d. Subpoenas from foreign courts requiring the production of records, files or documents will be reported expeditiously to HQ USAF/JACI.

12. Witnesses in Private Litigation:

a. Air Force personnel who are requested to appear and testify in private litigation in which the Government has no interest may be authorized to do so, if this regulation does not prohibit release of the requested information, and if there is no expense to the Government.

b. Expenses are arranged between the witnesses and the party requesting his appearance. If absence exceeds normal pass privileges, the witness takes regular or annual leave. Commanders should be as liberal as practicable in granting leave for this purpose.

13. Witnesses in State Criminal Proceedings:

- a. Air Force personnel who are subpoenaed to appear and testify in state criminal proceedings may be granted permissive temporary duty, as provided by AFR 35-26, at no expense to the Government.
- b. Expenses must be arranged between the witness and the party who subpoenaed him.

14. Witnesses in Litigation Involving the United States. In these instances, the following rules should be followed:

- a. When United States attorneys or foreign counsel employed by the Department of Justice request the attendance of witnesses, and no temporary duty is required, honor the request if practicable. HQ USAF/JACL/JACC/JACI or /JACP, as appropriate, should be advised of all such requests.
- b. When United States Attorneys request the attendance of witnesses and temporary duty is required, ask the United States Attorney to request the witness through the Administrative Division, Department of Justice. HQ USAF/JACL or /JACC, as appropriate, directs travel.
- c. In hospital recovery litigation, honor requests by counsel assisting in the hospital recovery claim if practicable, when no temporary duty is required. If temporary duty is required, comply with AFM 112-1.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil No. CV 7410064WPG

RICHARD D. HOOVER, PLAINTIFF

v.

WEBER AIRCRAFT CORPORATION,
A CORPORATION, ET AL., DEFENDANTS.

AFFIDAVIT AND CLAIM OF PRIVILEGE
BY THE SECRETARY OF THE AIR FORCE

COMMONWEALTH OF VIRGINIA)

) SS

COUNTY OF ARLINGTON)

Thomas C. Reed, being first duly sworn says:

1. I am the Secretary of the Air Force, a military department within the Department of Defense, and Executive Head of the Department of the Air Force, an agency of the Executive Branch of the Government of the United States of America.

2. I have been advised that the United States District Court for the Central District of California is considering the Defendants' motion to compel production of certain documents regarding the crash of a F-106 aircraft which occurred on 9 October 1973 near Tyndall Air Force Base, Florida, and resulted in the injury of the pilot of the aircraft, Captain Richard D. Hoover.

3. The four documents which are the subject of the motion to produce in this litigation were prepared in accordance with Air Force Regulation 127-4 and were

either extracted from or directly discuss findings and recommendations contained in the Aircraft Accident Report, hereinafter referred to as the AAR, regarding this particular crash.

4. I am aware of the contents of these four documents which are fully described in the affidavit of Major General Harold R. Vague, The Judge Advocate General of the Air Force. I am also aware that the parties to this litigation have been provided with the factual information regarding this unfortunate mishap.

5. For the following reasons, and with great reluctance, I feel compelled to formally invoke a claim of privilege to protect these four documents from disclosure. As Executive Head of the Department of the Air Force, I have a deep responsibility to protect the lives and welfare of the men and women who serve our nation in the United States Air Force, as well as to insure that our Air Force maintains the strongest posture possible. The sole purpose of the AAR is to determine information which can be used as a basis for corrective action for the prevention of such mishaps in the future. Lt. General Donald C. Nunn, The Inspector General of the Air Force, in his affidavit fully describes the dramatically reduced aircraft accident rate within the Air Force. The Air Force considers its flight safety program as being directly responsible for this significantly improved aircraft accident rate and the AAR is an indispensable part of its flight safety program.

6. I have given careful thought and consideration to the request of the litigants to produce the four documents and to the question of whether such production would be prejudicial to the efficient operation of the Department of the Air Force, the defense interests of the nation, and the public interest. I recognize that there are competing interests relative to the disclosure of documents and information contained in the AAR. But the overriding consideration should be that Air Force personnel who risk their lives operating aircraft on the fringe of scien-

tific achievement under adverse weather conditions should not be requested to do so without the benefit of the best aviation safety program available.

7. In order to obtain complete and candid information as to the circumstances surrounding an aircraft mishap, witnesses who give statements for an AAR are advised that their statements will be used solely for flight safety purposes. They understand that their statements, which often contain opinions and speculations as to the possible accident cause factors, are privileged and may not be disclosed except to authorized persons in the course of their duties. The aircraft accident investigators appeal to each of the witness' personal concern for the safety of others, promising secrecy. In some instances, persons are persuaded to make disclosures clearly against their interest or the interests of others. Release of the summary of the testimony of the witnesses in this case would set a precedent which would effectively dry up a vital source of information because the promise of confidentiality would no longer be enforceable.

8. Furthermore, under the present rules, Air Force personnel involved in accident investigations feel more free to assess blame, especially where allegations of negligence are involved, because they know their opinions will be seen only by persons within the Air Force whose duties are to promote flight safety. The disclosure of such opinions and deliberations in public proceedings would hamper the single-minded objectivity which Air Force personnel must carry out in aircraft accident investigations.

9. I have concluded that production of the four documents not furnished the litigants would prejudice the efficient operation of the Department of the Air Force and the defense interests of the United States, and would be contrary to the public interest, and, hence, would not be warranted. Accordingly, pursuant to the authority vested in me as Secretary of the Department of the Air Force, I assert the privileged status of the four docu-

ments described in the Affidavit of Major General Harold R. Vague and, therefore, respectfully decline production of those documents sought by the parties to this litigation. I also request that the Attorney General of the United States of America take all action necessary and appropriate to bring this claim of privilege to the attention of the Court and to defend the privilege here asserted.

/s/ Thomas C. Reed
THOMAS C. REED,
Secretary of the Air Force

Subscribed and sworn to this
19th day of July 1976.

(Name illegible)
Commission expires: 8-1-77

CERTIFICATE OF SERVICE BY MAIL

I, Laura M. Murphy, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is Office of United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by mail described in this Certificate was made; that on May 2, 1980, I deposited in the United States mails in the United States Courthouse at 312 North Spring St., Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of NOTICE OF MOTION FOR SUMMARY JUDGMENT; MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT with EXHIBITS A, B, C, AND D.

addressed to

Jacques E. Soiret Kirtland and Packard 626 Wilshire Boulevard Los Angeles, CA 90017	Lawrence J. Galardi 1901 Avenue of the Stars Suite 1631 Los Angeles, CA 90067
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at their last known address, at which place there is a delivery service by United States mail.

This Certificate is executed on May 2, 1980 at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Laura M. Murphy

USA-12c-240

(Rev. 1/3/77)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California,
Monday, August 4, 1980, 10:00 A.M.

THE CLERK: Item 19, civil 79-2883, Weber v. United States. Hearing re defendants' motion for summary judgment.

MR. STOTTER: James Stotter for the United States, your Honor, and the moving party.

THE COURT: Yes.

MR. GALARDI: Lawrence Galardi for the plaintiff Mills Manufacturing.

MR. SILBERBERG: Marshall Silberberg of Kirtland & Packard for Weber.

THE COURT: I have read the papers thoroughly. I have some tentative conclusions. The first is that this comes under Section 5 of the Freedom of Information Act in that it is an inter-agency or intra-agency memorandum that would not be available to a party other than in litigation with the agency.

With respect to the matter of public policy and executive privilege, as I have earlier indicated, I think there are very valid reasons, on the one hand, why the plaintiffs would like to have this report in order to impeach Captain Hoover and Major Ranone and anybody else whose depositions they have or who may have testified before that committee, but, on the other hand, the reasons for the government's saying to these people that testified before this committee, "Whatever you say is in confidence and, therefore, you can level with us because our main desire is to prevent further accidents," I think that is a very valid policy, and I think it covers this case like a blanket.

I have great sympathy for the plaintiffs' position. Certainly, if I were going to be the defendant in the Hoover action. I would love to have the opportunity to see anything that Captain Hoover said. The same thing is true with Ranone, and I can understand the plaintiffs' concern

lest the government try to make things easy for Captain Hoover and in this action place the blame on Weber or one of the other defendants. But I just cannot see the validity of upsetting that policy of the government getting witnesses to level with them with the understanding that they won't be seeing what they say before this commission in litigation either against them or in litigation which is contrary to the position that they took.

I am about to grant summary judgment.

Does anybody want to be eloquent?

MR. GALARDI: If you Honor please, Lawrence Galardi for the plaintiff Mills. I will try to be brief. I am not sure that I can be eloquent.

THE COURT: You always are, Mr. Galardi, but I don't think you are going to win this uphill battle.

MR. GALARDI: I would begin that in the McFadden vs. Avco case the Court find the government's position taken here sterile and patently offensive to suggest that the only way the Air Force—the Army in McFadden—was able to encourage or indeed solicit truth from Army personnel was by promising them that whatever they said would not at some later time be disclosed. That is indeed patently offensive. And I think that the dialogue that Judge Speers in San Antonio—your Honor will recall that we had occasion on an order to show cause in connection with a subpoena—

THE COURT: I read what you said about it.

MR. GALARDI: Yes, your Honor.

I think that dialogue probably is most apropos here. We are searching for the truth. We do not deal here with national security interests.

In the Theriault case, your Honor, we had some atomic scientists who were on an Air Force airplane observing atomic tests in the vicinity of a foreign power, and that airplane mysteriously disappeared, and I suggest that perhaps there in Theriault it was indeed a question of national security interests.

But here we have no such concern. Here we are looking at a situation seven years after the fact involving an

ejection from a F-106B aircraft. All of the material that we are dealing with is in the public domain. No one is going to be harmed or in any way prejudiced other than the defendants unless the material is not in fact disclosed.

And the inconsistencies are so patent that they cry out for disclosure here. If we are not indeed entitled to the so-called conclusions of the AIB, I submit we should be entitled to the various documents that were made a part of the report. I suspect that those documents have already been submitted to the Court for in camera inspection.

THE COURT: Not that I am aware. Not that I am aware.

If they are part of this—are these the ones that were tendered and then taken back?

MR. GALARDI: In part, yes, your Honor.

THE COURT: Well, as to that, if they were covered by the case that you—by your complaint, then the exception pertains to them anyway.

If it is a matter of—

MR. GALARDI: You mean there would be no waiver?

THE COURT: Yes. If it is a matter of—is it a matter of waiver?

MR. GALARDI: O'Keefe vs. Boeing, your Honor, I think was dispositive of that issue. O'Keefe is a time-honored case decided sometime when I was back in Washington. O'Keefe made it clear that what we are looking at, O'Keefe or McFadden or indeed here, is the element of essential fairness.

In O'Keefe The Boeing Company had the Air Force report and the Court said, "Well, you just can't give it to one party and not the other."

THE COURT: Yes.

MR. GALARDI: You can't permit, for example, as here Major Ranone testified with regard to conclusions that are inapposite to what the Air Force concluded to go before the jury and say, "Here is Major Ranone. He is

in his blue suit. Here is what they concluded," when everyone knows that isn't true.

THE COURT: It does seem to me that Major Ranone should not be permitted—if Major Ranone is to testify—if he testifies, it does seem to me that the present plaintiffs ought to be entitled to have the testimony that he gave before that commission.

What about that, Mr. Stotter?

MR. STOTTER: your Honor, the Air Force has never denied any access to any witness in a deposition or trial. Major Ranone can testify to everything he knows factually.

THE COURT: Yes, but suppose he said something different before this commission.

MR. STOTTER: That may be, your Honor, but to allow the statement that he made before the commission to be released is to destroy the whole pattern of aircraft accident investigation. This is one of the things that happens. As a matter of practicality, we can imagine a man going in to the Accident Investigation Board, testifying as to how an accident occurred, going across the street to the court martial investigation and either invoking the Fifth Amendment privilege or giving a completely different story.

There are two tribunals. One is for his punishment or review of any violation of statute or military law and the other is the investigation of accidents.

And for the last ten years, and—

THE COURT: I read all that, Mr. Stotter.

MR. STOTTER: And you agreed with it. What I am saying is I agree with your Honor.

Specifically what about Major Ranone? He is no different than any other witness that testified before the board. The fact that the man testifies before the board does not preclude these parties or any party from taking his deposition or making any investigation they want.

THE COURT: All right.

MR. GALARDI: If your Honor please.

THE COURT: Mr. Galardi.

MR. GALARDI: Your Honor, we have not been precluded from deposing Major Ranone.

THE COURT: What?

MR. GALARDI: Or indeed Airman Samuel Dickson. I urge today, and while this might sound rather harsh, there is a very real probability here that Dickson perjured himself somewhere.

Now, he testified in the deposition proceedings in the related litigation, in the underlying litigation, Hoover vs. Mills and Weber and others, that he that in fact did not have anything to do with either the upper or the lower disconnect mechanism.

He signed off with regard to having completed the upper disconnect, and we know that during the month that this board concluded its investigation and after it published its findings he was de-certified, he was given a broom, and he never again got close to the life support shop.

We know, too, that Major Ranone was the man that was fundamentally responsible for the failure of the life support shop.

So we have reason to understand, if I may, why it is that he testified the way he did in the litigation and different before the AIB.

With regard to Hoover, we are dealing with the very finite question of proximate cause and competent producing cause, which perhaps is the cause specific, if I may, of how it was that he was injured, and we can impeach his testimony before this Court in the deposition proceedings and before the collateral board.

THE COURT: All right.

MR. GALARDI: Thank you, your Honor.

THE COURT: I can well understand how fairness would indicate that you should have this material.

On the other hand, I can well understand the validity of the policy that says the testimony and the information given at this—whatever hearing we call it—what is that?

MR. STOTTER: Accident Investigation Board.

THE COURT: All right.—is—the mishap report is confidential and will not be used against you.

I can understand how that would be more valuable to these plaintiffs than any given situation.

But I think I end as I began: Having read all the papers, summary judgment will be granted to the government.

MR. STOTTER: Your Honor, we lodged on May 2—it has been a while ago—a proposed judgment and findings of fact.

THE COURT: I will wait five days to sign it. If any of you has any opposition, let me know within five days.

MR. GALARDI: All right, your Honor. In view of the fact that all of the authorities, and I say "all" advisedly, take the position that this is a matter in the Court's ultimate discretion certainly and recognizing national security interests, nevertheless in many of the cases they have granted the information sought, and in view of the position specifically taken by my client, I fear that we may have to go forward to the circuit on the issue.

THE COURT: I think that would be fine. No offense at all.

MR. GALARDI: Thank you, your Honor.

THE COURT: The is a troublesome issue.

MR. STOTTER: Mr. Rose called me from Philadelphia. He asked me to tell you that he is sorry he is not here. He is with Judge Pregerson in a case in Philadelphia.

THE COURT: All right.

MR. STOTTER: He is not a party. He doesn't have to be here.

THE COURT: All right.

SUPREME COURT OF THE UNITED STATES

No. 82-1616

UNITED STATES, PETITIONER

v.

WEBER AIRCRAFT CORPORATION, ET AL.

ORDER ALLOWING CERTIORARI

Filed June 27, 1983

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.